No. 18,674

IN THE

United States Court of Appeals

For the Ninth Circuit

ALBERT H. NEWTON and GENEVIEVE NEWTON,
Plaintiffs-Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation, MANUFACTURERS LIFE INSURANCE COMPANY, a corporation, and DOMINION LIFE ASSURANCE COMPANY, a corporation,
Defendants-Appellees and Third-Party Plaintiffs-Appellants,

LLOYD STEADMAN and WAYNE W. WENTNER,
Third-Party Defendants-Appellees.

BRIEF OF APPELLEES MANUFACTURERS LIFE INSURANCE COMPANY THE DOMINION LIFE ASSURANCE COMPANY AND LLOYD STEADMAN

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION OF DISTRICT COURT AND OF COURT OF APPEALS TO REVIEW THE JUDGMENTS

The statutory provisions which sustain the jurisdiction of the District Court are United States Code, Title 28, §§ 1332 and 1441.

The statutory provision which governs the jurisdiction of the Court of Appeals to review the judgments is United States Code, Title 28, § 1291.

The facts disclosing the basis upon which the District Court had jurisdiction and the Court of Appeals has jurisdiction to review the judgments are as follows:

"The action was commenced by the plaintiffs, Albert H. Newton and Genevieve Newton, by filing their complaint against the defendants, New York Life Insurance Company, Manufacturers Life Insurance Company and The Dominion Life Assurance Company, in the Superior Court of the State of California in and for the County of Siskiyou, on the 24th day of November, 1958." (Finding of Fact No. 2; R 50.)

"At the time the action was commenced, the plaintiffs, Albert H. Newton and Genevieve Newton, were, they have been at all times since and they are now residents and citizens of the State of California and of no other State." (Finding of Fact No. 3; R 50.)

"At the time the action was commenced, defendant New York Life Insurance Company was, it has been at all times since and it is now a corporation incorporated by and having its principal place of business in the State of New York, and a citizen of the State of New York and not of the State of California; at the time the action was commenced, defendant Manufacturers Life Insurance Company was, it has been at all times since and it is now a corporation incorporated by and having its principal place of business

in the Dominion of Canada, and a citizen of the Dominion of Canada and not of the State of California, and, at the time the action was commenced, defendant The Dominion Life Assurance Company was, it has been at all times since and it is now a corporation incorporated by and having its principal place of business in the Dominion of Canada, and a citizen of the Dominion of Canada and not of the State of California." (Finding of Fact No. 4; R 50-51.)

"At the time the action was commenced, the matter in controversy exceeded, it has at all times since exceeded and it now exceeds the sum or value of $10,000, exclusive of interest and costs." (Finding of Fact No. 5; R 51.)

"On the 15th day of December, 1958, the action was duly and regularly removed to this [District] Court." (Finding of Fact No. 6; R 51.)

"Thereafter, by and with leave of this [District] Court, each of the said defendants, as a third-party plaintiff, served a summons upon and served and filed a third-party complaint against Lloyd Steadman and Wayne W. Wentner as third-party defendants, claiming and asserting that, if judgment should be rendered for the plaintiffs against the defendants, or any of them, the third-party defendants should be held liable to the said defendants, as third-party plaintiffs, for the amount thereof." (Finding of Fact No. 7; R 51.) (See Federal Rules of Civil Procedure, Rule 14.)

"By and with the consent of all parties hereto, and pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, this action came on regularly for the trial

of one separate issue, before the [District] Court, sitting without a jury, on the 14th day of August, 1962, and was duly submitted to the Court for consideration and decision, and the Court, having considered the evidence and the arguments presented, and being fully advised in the premises, * * * made and filed herein on the 21st day of November, 1962, its Memorandum and Order whereby judgments were rendered in favor of the defendants, Manufacturers Life Insurance Company, The Dominion Life Assurance Company and New York Life Insurance Company, against the plaintiffs, Albert H. Newton and Genevieve Newton, * * *." (Findings of Fact and Conclusions of Law; R 49-50.)

On March 1, 1963, the Judge of the District Court signed and filed a Judgment whereby it was Ordered and Adjudged that the defendants, Manufacturers Life Insurance Company, The Dominion Life Assurance Company and New York Life Insurance Company, have judgment against the plaintiffs, Albert H. Newton and Genevieve Newton, that their action against the said defendants be dismissed and that each of the said defendants recover from the said plaintiffs its costs, and that the third-party defendants, Lloyd Steadman and Wayne W. Wentner, have judgment against the third-party plaintiffs, Manufacturers Life Insurance Company, The Dominion Life Assurance Company and New York Life Insurance Company, that their third-party actions against the said third-party defendants be dismissed and that each of the said third-party defendants recover from

the said third-party plaintiffs his costs. (Judgment; R 61-62.)

The Court of Appeals has held that this Judgment was "entered" on March 5, 1963. (See Opinion of Court of Appeals filed on June 20, 1963.)

The Notice of Appeal by the Plaintiffs was filed on April 3, 1963. (R 69.)

The Notices of Appeal by Manufacturers Life Insurance Company, The Dominion Life Assurance Company and New York Life Insurance Company as third-party plaintiffs were filed on March 29, 1963. (R 73-78.)

It should be noted that, in a case such as this, where the plaintiffs did not sue the third-party defendants, sought no recovery against the third-party defendants and do not have a judgment or judgments against the third-party defendants, no independent jurisdictional ground is required for the third-party actions, and, particularly, that diversity of citizenship is not required either between the plaintiffs and the third-party defendants or between the defendants as third-party plaintiffs and the third-party defendants. (See Moore's Federal Practice, Second Edition, 1948, Volume 3, pages 494-496, and 1962 Cumulative Supplement to Volume 3, pages 66-67, note 6, where cases are collected; and, to same effect, see Barron and Holtzoff, Federal Practice and Procedure, Volume 1A, 1960, pages 650-651.)

STATEMENT OF CASE

This was an action for damages for alleged fraud, concealment and misrepresentation in the issuance and sale of certain life insurance and annuity policies and contracts. The defendants and third-party defendants denied all of the charges of the plaintiffs and also asserted other defenses. (R 50.)

One of the defenses raised was that the action was barred for failure to bring suit within the time prescribed in the Incontestable Clauses contained in all of the annuity contracts and life insurance policies involved in the action. (R 51-52.)

By and with the consent of all parties, a separate trial was had on this defense pursuant to Rule 42(b) of the Federal Rules of Civil Procedure. (R 49, 52.) It was *agreed* between the plaintiffs on the one hand and the defendants and third-party defendants on the other hand that a ruling on this defense in favor of the defendants and third-party defendants would entitle the defendants to judgment against the plaintiffs. (R 52.)

The specific and only questions presented to the Trial Court for determination were:

> (1) Whether the periods specified in the Incontestable Clauses began to run from the dates of issue of the policies and contracts, or at the time the plaintiffs discovered, or in the exercise of reasonable care should have discovered, the alleged fraud upon which this action was based; and

(2) Whether the Incontestable Clauses are for the benefit of the insurers and issuing companies, as well as for the benefit of the insureds and annuitants. (R 52-53.)

Each contract and policy involved contains an Entire Contract Clause (wherein it is stated that the written instrument is the entire agreement between the parties) and an Incontestable Clause. (R 53-57.) While there is some variation in the language of the Clauses in the different instruments, the provisions are substantially similar, and the following provisions from the annuity contracts issued by Manufacturers Life Insurance Company (R 53-54) are illustrative of all:

"THE CONTRACT. This contract is issued in consideration of the application therefor, and of the statements and agreements therein contained and, together with the application (a copy of which is attached hereto and made a part hereof), constitutes the entire contract. . . .

. . .

"No provision or condition of this contract may be waived or modified except by an endorsement signed by the President, Vice President or Secretary.

"INCONTESTABILITY. This contract shall be incontestable after it has been in force during the lifetime of the Annuitant for two years from date of issue."

The Trial Judge found that the contracts and policies issued by the defendants constituted the entire

agreements between the plaintiffs and defendants respectively (R 57) and that the Incontestable Clauses were clear and unambiguous. (R 57.) The Court held that the periods specified in the Clauses began to run from the dates of issue of the various contracts and policies (R 57) and that the Clauses were for the benefit of the insurers and issuing companies as well as for the benefit of the insureds and annuitants. (R 57.) The time specified in the Incontestable Clauses having expired, the Court rendered judgment for the defendants accordingly.

The case of *Anderson v. Knox,* 297 F. 2d 702, cited by the appellants, is not even remotely pertinent to the issue presented on this appeal.[1]

BACKGROUND

As noted, the issue presented to the Trial Court was narrow. The only questions presented were those set forth above, but there are certain well founded and irrefutable principles of law upon which the Trial Court's ruling was based. These principles are the postulates upon which the Judgment is based and are set forth here, with supporting authorities, solely as background material.

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[1]Throughout this brief, the word "appellants" refers to Dr. and Mrs. Newton, the plaintiffs below.

1. **An Incontestable Clause is in the Nature of and Serves a Similar Purpose as the Statute of Limitations.**

The concept and purpose of an Incontestable Clause is well expressed in 1 Appleman, *Insurance Law and Practice,* page 347, where it is stated:

> "The incontestable clauses are particularly enforced by the courts because of the desirable purpose which they have. It is their purpose to put a checkmate upon litigation; to prevent, after the lapse of a certain period of time, an expensive resort to the courts—expensive both from the point of view of the litigants and the citizens of the state. In that way, it is a statute of limitations upon the right to maintain certain actions or certain defenses, * * *"

In *Dibble v. Reliance Life Insurance Company,* 170 Cal. 199, 209, 149 P. 171, 174, the California Supreme Court stated:

> "It [an Incontestable Clause] is not a stipulation absolutely to waive all defenses and to condone fraud. On the contrary, it recognizes fraud and all other defenses but it provides ample time and opportunity within which they may be, but beyond which they may not be, established. It is in the nature of and serves a similar purpose as statutes of limitations and repose, the wisdom of which is apparent to all reasonable minds. * * * The parties to a contract may provide for a shorter limitation than that fixed by law and such an agreement is in accord with the policy of statutes of that character."

2. **Incontestable Clauses Bar Actions Involving Fraud in the Issuance and Sale of Annuities and Insurance Policies.**

An Incontestable Clause bars so-called "inception" claims and defenses, that is, matters pertaining to the validity of the contract in its inception, including fraud. In *Mutual Life Insurance Co. v. Margolis,* 11 Cal. App. 2d 382, 384, 53 P. 2d 1017, 1018, the Court held:

> "The validity of a so-called incontestability clause in a contract of insurance is fully established in this state in the case of *Dibble v. Reliance Life Ins. Co.,* 170 Cal. 199, which upholds the sufficiency of such provisions in a life insurance contract and quotes from many authorities to support its conclusion. It is there held, which answers the first contention of appellant, that such a clause in a contract of insurance does not waive all defenses and condone fraud, but in so far as it allows a reasonable opportunity to discover the fraud and grants ample time to present the defense of fraud, it is only fixing a shorter period of limitation than that provided by the general statute of limitations, and acts as a further statute of repose, which in accord with well-established principles of law the legislature can do. The Supreme Court said, adopting the opinion of Mr. Justice Burnett of this Court: '. . . it was not the object of the parties to said insurance policy to exempt the insured from the consequences of his fraud, but the object and effect of said incontestable clause was simply to provide a shorter term for maintaining said claim than is prescribed by the statute of limitations. In other words, in my opinion, by said section

(1668, Civ. Code) the legislature did not intend to condemn a contract that in the interest of repose and security would fix a reasonable limit for the time in which such defense might be successfully urged, but the intention was to preclude a contract that would altogether relieve either party of the consequence of his own fraud.' ''

3. Incontestable Clauses Bar Actions for Damages for Fraud as Well as Actions for Rescission.

An Incontestable Clause is equally efficacious to bar actions for damages for fraud as well as actions for rescission. In the instant case the appellants have surrendered the contracts and policies according to their terms for their stated and agreed value (R 31), and by this action now seek to recover an additional sum as damages for an alleged fraud in the issuance of the contracts. This action is as much a "contest" of the contracts within the meaning of the incontestable clauses thereof as though the appellants had sued in rescission. A similar procedure as here employed by the appellants was condemned in *Columbian National Life Insurance Company v. Wallerstein* (CA 7) 91 F. 2d 351. In that case the plaintiff insurer, having been induced to issue a life and disability insurance policy by the fraudulent misrepresentations of the insured, and being barred by the incontestable clause of the policy from denying the insured's claim for benefits, sued the insured for damages on account of the fraud. Holding that the action was barred by the incontestable clause in the policy, the Court quoted with approval from the opinion of the District Court, as follows (page 352):

> " 'If plaintiff is permitted to succeed under its theory, it is doing indirectly what it has contracted it cannot do directly. It would be rather an anomalous proceeding to hold that defendant may recover against plaintiff under the terms of his fraudulent contract and plaintiff would not be permitted to defend any suit because it has contracted away its right to do so, and yet hold that defendant is liable in damages to the plaintiff. * * * The incontestability clause is * * * in the nature of a statute of limitation and repose, and while conscious fraud practiced in inducing another to act, to his detriment, is extremely obnoxious, yet the law recognizes that there should be a limitation of time in which an action may be brought or a defense set up. The parties in the case at bar have contracted that this limitation shall be one year.' "

And see *New York Life Insurance Company v. Weaver's Administrator,* 114 Ky. 295, 70 SW 628, 629, where the Court said:

> "Besides, if, as appellant [the insurer] seems to concede, the incontestable clause in the policy precluded them from resisting its payment on the ground of fraud, it logically follows that it is equally efficacious to defeat any action brought against the estate of the decedent for damages by reason thereof."

It is against this background of postulates that the parties reached their agreement (R 52) that a decision in favor of the defendants on the narrow question presented to the Court would entitle the defendants to judgment.

STATEMENT OF ISSUE

The appellants have abandoned on this appeal their contention made in the District Court that the periods prescribed in the Incontestable Clauses commence to run only from the date of the alleged discovery of fraud. Therefore, the single issue presented to this Court for determination is:

> Are the Incontestable Clauses in annuity contracts and life insurance policies for the benefit of the issuing companies and insurers as well as for the benefit of the annuitants and insureds?

ARGUMENT

I

THE INCONTESTABLE CLAUSES ARE CLEAR AND UNAMBIGUOUS AND ARE FOR THE BENEFIT OF EITHER PARTY TO THE CONTRACT.

The Incontestable Clauses contained in the contracts and policies involved in this action are clear, explicit and unambiguous, and are for the benefit of either party to the contract. Indeed this conclusion is recognized by the very first authority cited by the appellants in their Opening Brief, at page 4. They there refer to page 188 of "The Life Insurance Contract", by Horne and Mansfield, 2nd ed., N.Y. 1948, but they have failed to inform this Court that on the two pages immediately preceding their reference, Horne and Mansfield take a position directly contrary to the position taken by the appellants on this appeal. At pages 186-187 this work states:

> "The effect of the exceptions in the clause has been to suggest to many courts the application of 'expressio unius est exclusio alterius' and the psychological result of this has been to divert attention of the court from the real meaning of the clause; i.e., that after the stipulated period *the terms of the policy must be carried out—the contract* cannot be contested, and by implication, none of its terms can be contested *by either party.* The clause does not provide that the policy 'shall be incontestable by the insurer' any more than 'by the insured.'" (The emphasis in this quotation is that of the authors; it has not been added by us.)

The clauses involved *say:* "This contract shall be incontestable". The appellants are attempting to assert that this *means* something entirely different: This contract shall be incontestable *by the insurer but not by the insured.* But the appellants are not at liberty to insert words into the Incontestable Clauses which they do not contain. As the United States Supreme Court said in *Mutual Life Insurance Co. v. Hurni Packing Co.,* 263 U.S. 167, 177, 68 L. ed. 235, 240:

> "In order to give the [Incontestable] clause the meaning which the petitioner ascribes to it, it would be necessary to supply words which it does not at present contain. The provision plainly is that the policy shall be incontestable upon the simple condition that two years shall have elapsed from its date of issue;—not that it shall be incontestable after two years if the insured shall live, but incontestable without qualification and in any event."

In *Columbian National Life Insurance Co. v. Black* (CA 10), 35 F. 2d 571, the plaintiff sought reformation of the contract to correct a clerical error. Speaking of the Incontestable Clause the Court stated at page 577:

> "* * * *the clause is not one-sided,* and the right of the assured to have the writing express the agreement actually made is no greater than the right of the assurer." (Emphasis added.)

Similarly in *Winer v. New York Life Insurance Co.* (Fla.), 190 So. 894, the Court stated at page 900:

> "We have held that incontestable clauses are favored by the law and are for the *protection* of the insured, as well as the insurer." (Emphasis added.)

The Supreme Court of the State of California in the case of *Coodley v. New York Life Insurance Co.,* 9 Cal. 2d 269, 272, 70 P. 2d 602, 603, stated:

> "The validity and binding effect of an incontestable clause *upon the parties* to an insurance policy was sustained by this court in the case of *Dibble v. Reliance Life Ins. Co.,* 170 Cal. 199." (Emphasis added.)

It is significant that the Court said that the Clause was binding "upon the parties". It did not say that the Clause was binding upon only one of the parties.

And in *Kansas Mut. Life Ins. Co. v. Whitehead,* 123 Ky. 21, 93 SW 609, 610, the Court said:

> "The incontestable clause under consideration, on the contrary, is a reasonable stipulation op-

erating in favor of *both the contracting parties.*" (Emphasis added.)

The words of the Court in *Dorman v. John Hancock Mutual Life Insurance Company* (D.C. S.D. Cal.,) 25 F. Supp. 889, 890, 891, 893 (affirmed 108 F. 2d 220), seem particularly appropriate to this action. Speaking of the Incontestable Clause and the Entire Contract clause contained in the policy there involved, the Court stated:

> "The group policy contained an incontestability clause reading: 'This policy shall be incontestable after one year from the date of issue except for non-payment of premiums.'
>
> * * *
>
> "At the outset, we must bear in mind that, under the law of California, incontestability clauses are contractual limitations akin to statutory limitations of actions and preclude 'any defense after the stipulated period on account of false statements warranted to be true, even though such statements were fraudulently made, unless by the terms of the policy fraud is expressly or impliedly excepted from the effect of such provision.'
>
> * * *
>
> "An incontestability clause excludes all grounds of contest not mentioned in it. See Mutual Reserve Fund Life Ass'n v. Austin, 1 Cir., 1905, 142 F. 398, 6 L.R.A., N.S., 1064; Equitable Life Assurance Society v. Deem, 4 Cir. 1937, 91 F.2d 569; New York Life Insurance Company v. Kaufman, 9 Cir., 1935, 78 F.2d 398. In the case first cited, the Court said (page 401):

"'The term "incontestable" is of great breadth. It is the "policy" which is to be incontestable. We think the language broad enough to cover all grounds for contest not specially excepted in that clause.'

* * * * * * *

"The policy here under consideration * * provides:

"'Entire Contract. This policy, with the application of the Employer and the individual applications, if any, of the Employees insured, copies of which are attached hereto, shall constitute the entire contract between the parties. All statements made by the Employer or by the individual employees shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall be used in defense of a claim under this policy unless it is contained in the written application. Only the President, Vice-President, Secretary or Assistant Secretary has power on behalf of the Company to make or modify this contract of insurance.'

"In effect, the written statements of both parties contained in the policy, the application of the employer and the individual applications of the employee, which by this very clause are declared to 'constitute the entire contract between the parties', are the measure of the insurer's responsibility.

"Clauses of this character work both ways. They aim to protect both sides against resort to outside evidence in order to assert rights not granted or specifically excluded."

The appellants have cited several texts in their brief. None of these works states that Incontestable

Clauses are not for the benefit of the issuing company. And, as noted above, the only text that considers the issue, "The Life Insurance Contract", by Horne and Mansfield, states unequivocally that the clause prevents a contest by *either* party. (Supra, page 14.) Accordingly, with the exception noted, the cited texts are not germane to the issue.

The only case authority relied upon by appellants which even mentions incontestable clauses is a dictum by the trial judge in *Donohue v. New York Life Insurance Co.* (D.C. Conn.), 88 F. Supp. 594, 596. That dictum, which is contained in a one paragraph comment tacked on to a decision in favor of the insurer on another ground, with no citation of authority to support the dictum, was rejected by the District Court in the case at bar. (R 45-46.)

The cases of *Fawcett v. Sun Life Assur. Co. of Canada* (CA 10), 135 F. 2d 544; *Stark v. Equitable Life,* 205 Minn. 138, 285 N.W. 466; *Forman v. Mutual Life Insurance Co.,* 173 Ky. 547, 191 S.W. 285; *Rohrschneider v. Knickerbocker Life Ins. Co.,* 76 N.Y. 216, and *Harwood v. Security Mutual Life Ins. Co.,* 263 Mass. 341, 161 N.E. 589, referred to in the appellants' Opening Brief, are not even remotely in point. The appellants ask this Court to speculate why Incontestable Clauses were not mentioned in these cases. Even without knowing the terms of the individual policies or the law in each of the separate states, a good reason for not mentioning such clauses (if there were such clauses) is apparent from the decisions in most of the cases. Three of the cases

(*Fawcett, Stark* and *Harwood*) test the sufficiency of the plaintiff's complaint by demurrer or other procedural device, and quite obviously a defense of incontestability would not yet have been asserted in such a proceeding. Another of appellants' cases was decided in 1879 (*Rohrschneider v. Knickerbocker Life Ins. Co.,* 76 N.Y. 216) and there is nothing in the opinion to indicate whether Knickerbocker Life was using incontestability clauses at this early date. *Forman v. Mutual Life Ins. Co.,* 173 Ky. 547, 191 S.W. 279, is not in point, since it was an action *on* the contract to compel payment of the amount due under the contract.

Under the guise of interpretation and construction, the appellants ask this Court to rewrite the incontestable clauses in the contracts. The appellants refer to the well settled rule of law that ambiguities in an insurance contract will be resolved against the insurer. But it is equally well settled that where the terms of the contract are clear the Court will not indulge in a forced construction. As the Supreme Court of the State of California stated in *Long v. West Coast Life Insurance Co.,* 16 Cal. 2d 19, 24, 104 P. 2d 646, 649:

> "* * * while it is the rule that insurance policies should be construed liberally in favor of the insured, *the court cannot interpolate provisions in any insurance policy which provisions do not in fact exist.*" (Emphasis ours.)

See also *New York Life Insurance Co. v. Hollender,* 38 Cal. 2d 73, 81, 237 P. 2d 510, 514.

Significantly, the appellants have not even attempted to point out wherein lies any ambiguity or uncertainty in the Incontestable Clauses involved in this action. This Court, however, has specifically held in the case of *Richardson v. Travelers Ins. Co.,* 171 F. 2d 699, at page 700 that:

> "The wording of the incontestable clause is unambiguous."[2]

The California Courts also have held that Incontestable Clauses are unambiguous. (See *Mutual Life Ins. Co. v. Margolis,* 11 Cal. App. 2d 382, 53 P. 2d 1017.)

II

INCONTESTABLE CLAUSES IN ANNUITY CONTRACTS MUST OPERATE IN FAVOR OF THE ISSUING COMPANY.

The construction placed upon the Incontestable Clauses by the appellants is not only contrary to the plain meaning of the clauses themselves, but also renders the clauses *meaningless* in annuity contracts. Defendants Manufacturers and Dominion sold only single premium annuity contracts to the appellants. (R 44, 53-55.) Annuity contracts are basically and fundamentally different from life insurance policies. The differences are well summarized in 1 Appleman,

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[2]Although the ultimate conclusion of *Richardson* has been questioned and distinguished (see *New York Life Ins. Co. v. Hollender,* 38 Cal.2d 73, 83, 84, 237 P.2d 510, 515, 516; *Mutual Life Ins. Co. v. Simon* (D.C. S.D. N.Y.), 151 F. Supp. 408, 414, 415; *Flax v. Prudential Insurance Co. of America* (D.C. S.D. Cal.) 148 F. Supp. 720, 726), no court has questioned the proposition that the incontestable clauses are unambiguous.

Insurance Law and Practice, Section 83, Page 76, viz.:

> "Ordinarily, it is recognized, even by laymen, that contracts of life insurance and of annuity are distinctly different. One involves payments of stated amounts, known as premiums, by the insured over a period of years in return for which the insurer creates an immediate estate in a fixed amount in the event of his death while in good standing. * * * There is an immediate hazard of loss thrown upon the insurer, with the required performance by the insured of certain obligations at designated intervals of time.
>
> "An annuity contract is almost diametrically opposed to this. The person designated as the recipient is the person paying the money. He pays in a fixed sum at one time, in return for which the company must then perform a series of obligations over a period of years, at designated times. The hazard of loss is no longer upon the company but upon the recipient who may die before any benefits are received. Instead of creating an immediate estate for the benefit of others, he has reduced his immediate estate in favor of future contingent income. The positions are almost exactly reversed. Annuity contracts must, therefore, be recognized as investments rather than as insurance."

In *Estate of Barr,* 104 Cal.App.2d 506, 508, 231 P. 2d 876, 878, the Court stated as follows:

> " 'From the viewpoint of risk, a life insurance policy and an annuity contract are, in fact, diametrically different. Under the former the com-

> pany will lose in the event of the insured's premature death; under the latter the company will gain.' "(Quoting Randolph Paul, Federal Estate and Gift Taxation, Vol. I, p. 498.)

And in *Equitable Life Assur. Soc. v. Johnson,* 53 Cal. App. 2d 49, 57, 127 P. 2d 95, 99, the Court said:

> "It is quite clear that an annuity contract differs from a life insurance contract. The risk is fundamentally different in the two contracts. In a life insurance policy the risk assumed is to pay upon the assured's death; in a pure annuity contract the risk assumed is to pay as long as the assured may live."

Unless the Incontestable Clauses contained in the annuity contracts issued by Manufacturers and Dominion operate in favor of the companies, they are *meaningless.* In a single premium deferred refund annuity, the type here involved, there is no benefit which can flow to the annuitant from an incontestable clause. This is simply because of the nature of the contracts. These annuities are investment contracts which are available to the public for a fixed price and without regard to insurability. There is no insurer, no insured, and no insurance, as such, in these contracts and, once issued, the company will *never have occasion or reason to contest them.* All the criteria of insurability in a life insurance policy are as immaterial in an annuity contract as in the sale of a share of stock or a government bond. No medical examination is required. The health, habits, character, occupation, etc. of the annuitant are of no impor-

tance or significance to the company in issuing an annuity of this type. To illustrate, the application for the contract (see Manufacturers exhibits C and D) asks only for basic informational data, such as name, address, beneficiary, etc. There is no way the company could be deceived into issuing such an annuity, nor is there any conceivable reason why the company would wish to contest the contract within the meaning of the incontestable clause after it had issued it.[3] Because of this irrefutable fact, it is apparent that the incontestable clause is devoid of meaning unless it is for the benefit of the company. The true and only purpose which can be ascribed to the incontestable clause in an annuity is to bar the very type of action brought by the appellants many years after the issuance of the contracts.

It is obvious that the appellants' views of the purpose of an incontestable clause cannot be applicable to an annuity. Appellants contend that the purpose of the clause was to prevent a contest of a life policy on the insured's death, many years after its issuance. But the liability of a life insurer *matures* on death, while that of the promissor in an annuity contract, except for final refund features, if any, *terminates* upon death. It is, therefore, illogical to suppose that the purpose of the clause in an annuity is to prevent

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[3]A misstatement of age by the applicant is not an exception. While the age of the annuitant is of importance in fixing the amount of periodic payments, each contract has an Age Adjustment Clause which operates to correct the effect of an erroneous statement of age. The operation of the Age Clause is not precluded by the incontestable clause. (See *New York Life Ins. Co. v. Hollender,* 38 Cal.2d 73, 237 P.2d 510.)

the company from commencing a contest of its contract on the death of the annuitant, *after* it had fully performed its agreement and *after* its liability thereon had *terminated.*

The appellants apparently concede that the Incontestable Clause in an annuity contract must operate in favor of the company (see appellants' Opening Brief, page 6), but seek to avoid the effect of the clause by stamping it as "boilerplate". The appellants' efforts in this regard are insufficient as a matter of law. The Court must give effect to each provision of the contract.

> "In construing life insurance policies as in the construction of other contracts, the entire contract is to be construed together for the purpose of giving force and effect to each clause."
>
> *New York Life Ins. Co. v. Hollender*, 38 Cal. 2d 73, 81, 237 P. 2d 510, 514.

As Chief Justice Waste of the California Supreme Court stated in *Ogburn v. Travelers Ins. Co.*, 207 Cal. 50, 52, 267 P. 1004, 1005:

> "In the interpretation of a written instrument the primary object is to ascertain and carry out the intention of the parties thereto. (Citations) This fundamental rule finds recognition in Section 1636 of our Civil Code, wherein it is provided that 'A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.' As to the hardships, advantages or disadvantages which may result from such a construction, the courts have

> nothing to do. (Citation) The intention of the parties is, of course, to be ascertained from a consideration of the language employed by them and the subject matter of the agreement. (Citation) A contract should be construed, however, as an entirety, the intention being gathered from the whole instrument, taking it by its four corners. *Every part thereof should be given some effect.*" (Emphasis added.)

Confronted with the overwhelming logic of the conclusion of the District Court that the inclusion of an incontestable clause in an annuity contract must be primarily for the benefit of the issuing company (R 46-47, 58), the appellants suggest that "many times" the insertion of the clause has become "essentially meaningless" (whatever that means). They attempt to illustrate by saying that "A comparable instance is provided by the thousands of printed leases that are executed annually in Southern California and Arizona, each solemnly spelling out the duties of landlord and tenant with respect to removal of snow on the sidewalk." (Appellants' Opening Brief, pages 6-7.) But it does not follow, as the appellants would imply, that, if and when it does snow in either southern California or Arizona, those provisions are not fully effective, and binding upon the party obligated to remove the snow.

So, also, is it in the case of an insurance policy. In the rare case where the insurer is charged with fraud, the incontestable clause, which by its terms works both ways, is available to the insurer as a defense, just

as it would be to the insured if he were charged with fraud.

It has been demonstrated that the incontestable clause in an annuity contract must *necessarily* operate in favor of the company or it is meaningless. The language of the clauses, however, in both the annuity contracts and the life insurance policies is substantially identical, and diametrically opposed meanings cannot be ascribed to the same words. Accordingly, the conclusion is inescapable that the incontestable clause in a life policy must be and is for the benefit of an insurer as well as an insured. This conclusion is in accord with not only the purpose of the clause, the authorities cited, logic and reason, but with the clear and explicit terms of the clauses themselves.

CONCLUSION

The judgment of the Trial Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY RESPONSIBLE FOR THE PREPARATION OF THIS BRIEF

I certify that I am one of the attorneys responsible for the preparation of this brief; that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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